doubted whether they are anything more than the application of the same theory of proximate cause to varying situations. See 1 Sedgwick, *op. cit.* 273-276, criticising *Hobbs v. Ry.* (1875) L. R. 10 Q. B. 111 (which limits damages against a carrier on the theory that the action was one of contract). There are two theories as to the nature of the defendant's tort. See Huffcut, *Liability of a Bank to Maker of a Check for the Wrongful Dishonor Thereof* (1902) 2 COL. L. REV. 193, 196. The weight of authority seems to consider it analogous to slander of one in his profession. *J. M. James Co. v. Bank* (1900) 105 Tenn. 1, 58 S. W. 261. A few courts look upon banks as public agencies and hold them liable on grounds of policy. *Patterson v. Marine Bank* (1889) 130 Pa. 419, 433, 18 Atl. 632, 633. Where the depositor is a merchant or trader, the general rule is in accord with the principal case in granting the plaintiff substantial damages without proof of special damage. *Rolin v. Steward* (1854) 14 C. B. 594; *Lorick v. Palmetto Bank and Trust Co.* (1906) 74 S. C. 185, 54 S. E. 206, 7 Ann. Cas. 818, note. Where the depositor is not a merchant, there is a conflict. The rule seems to allow the plaintiff to recover nominal damages only unless special damage is proved. *Bank v. Ober* (1910, C. C. A. 8th) 178 Fed. 678; *Bank v. Milvain* (1884) 10 Vict. L. R. Law, 3. Many courts do not admit this distinction and apply to the case of the ordinary depositor the general rule applicable to traders. *Bank v. MacKnight* (1907) 29 App. D. C. 580. The amount of substantial damages recoverable in such actions is generally termed temperate and reasonable. *Hilton v. Banking Co.* (1907) 128 Ga. 30, 57 S. E. 78. In New York the above rules do not apply unless the bank's act is malicious or willful. *Davis v. Bank* (1900) 50 App. Div. 210, 63 N. Y. Supp. 764; *Wildenberger v. Bank* (1919) 187 App. Div. 320, 175 N. Y. Supp. 430. The language of the courts in the principal case on the subject of presumptions is rather confusing, but the decision seems to be in accord with the weight of authority. For collection of authorities see (1914) 78 CENT. L. J. 97; (1915) 3 CALIF. L. REV. 487; (1912) 21 YALE LAW JOURNAL, 619.

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF HABIT TO PROVE CONTRIBUTORY NEGLIGENCE.—The plaintiff's husband was killed while driving an automobile, in a collision with the defendant's car. An eye-witness testified as to the circumstances of the accident. The defendant offered evidence that the deceased had, by reputation, a habit of becoming intoxicated and driving his automobile recklessly while in such condition. *Held,* that the deceased was guilty of contributory negligence, and that the evidence offered was admissible on that issue. *Southern Traction Co. v. Kirksey* (1920, Tex.) 222 S. W. 702.

It is well settled that evidence of character is not admissible in a civil action, chiefly because it is of slight probative value and tends to confuse the issues. 1 Greenleaf, *Evidence* (16th ed. 1899) 40 ff.; 22 C. J. 470. Evidence of a habit of intoxication or of negligence sufficiently constant to be of probative value is difficult to distinguish from evidence of character. 1 Wigmore, *Evidence* (1904) secs. 96, 97. Evidence of a general habit of drunkenness has been held irrelevant on the question of contributory negligence. *Great Northern Ry. v. Ennis* (1916, C. C. A. 9th) 236 Fed. 17. But evidence of a habit of doing a particular act negligently has been admitted. *Hodges v. Hill* (1913) 175 Mo. App. 441, 161 S. W. 633; *contra, M. K. & T. Ry. Co. v. Johnson* (1898) 92 Tex. 380, 48 S. W. 568. The habit involved in the instant case is apparently on the border-line between the two mentioned above. It would seem to be of very slight probative value in determining the conduct of the deceased on this particular occasion, especially when direct evidence showed what that conduct was. In such circumstances evidence of habit offered to prove the absence of negligence is generally excluded. *Zucker v. Whitridge* (1912) 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683, note. And there appears to be no reason why the same rule should not apply on

the question of proving contributory negligence. Although there is much conflict of authority, the decision in the instant case seems contrary to previous Texas decisions and to the better rule.

EVIDENCE—PROVINCE OF THE COURT—QUESTIONS BY A JUDGE TO A WITNESS.—The defendant was convicted of rape. He appealed and assigned as one ground of error that the court undertook the examination of one of the witnesses and thereby prejudiced the jury. *Held,* that the examination by the judge was error. *State v. Sandquist* (1920, Minn.) 178 N. W. 883.

The general rule of the orthodox common law, and of the majority of jurisdictions in the United States, is that the judge has not only the power to examine witnesses, but that he is under a duty to do so when it appears that the witness is evasive, diffident, or ignorant. He may even call new witnesses of his own volition, if he feels that the whole truth has not been disclosed. In so acting, however, he must so frame his questions that he gives no impression of partiality to the jury. *Adler v. United States* (1910, C. C. A. 5th) 182 Fed. 464; *Dutton v. Territory* (1910) 13 Ariz. 7, 108 Pac. 224; 1 Wigmore, *Evidence* (1904) sec. 784. The same rule applies to civil as well as to criminal cases. *Eekhout v. Cole* (1904) 135 N. C. 583, 47 S. E. 655. In the instant case, the court would limit the judge to questions in only rare and unusual instances. It is submitted that the correct decision was reached, since there was an indication of partiality on the part of the judge, but as a general rule the judge should have wider powers than the language of the court suggests.

INSURANCE—MARINE INSURER LIABLE FOR UNREPAIRED DAMAGE ALTHOUGH SHIP WAS LATER TOTALLY LOST THROUGH AN EXCEPTED PERIL.—The plaintiff's steamship *Eastlands* was insured by the defendant under a time policy against perils of the seas only, including particular average. She had been requisitioned by the Admiralty and was under a charter-party to the government, which undertook to pay the value of the ship, at the time she was lost, if a loss was occasioned by war risks. During the currency of the policy, she was damaged by perils of the seas, only part of which damage had been repaired when she was torpedoed and became a total loss. In an action on the policy, the issue was as to the liability of the defendant for the unrepaired damage. *Held* in the Court of Appeal, that the defendant was liable. *Wilson Shipping Co. Ltd. v. British & Foreign Marine Ins. Co.* [1920] 2 K. B. 25.

The defendant's argument, adopted in the King's Bench Division, was that it was not liable because the partial loss was merged in the total loss from an excepted peril. In 1810 Lord Ellenborough formulated the rule that "where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim against the underwriters." *Livie v. Janson* (1810) 12 East, 648, 654. It was unsuccessfully attempted to interpret this rule as meaning that an insurer is not liable for unrepaired damages in any case where the subject-matter is later wholly lost by an excepted peril before termination of the risk. *Knight v. Faith* (1850) 15 Q. B. 649; *Pitman v. Universal Marine Ins. Co.* (1882) L. R. 9 Q. B. 192; but see 17 Halsbury, *Laws of England,* 469; 5 Joyce, *Insurance* (2nd. ed. 1918) sec. 3016; 2 Arnould, *Marine Insurance* (9th ed. 1914) 1290. In an early dictum this interpretation was recognized as the law in America. See *Rice v. Homer* (1815) 12 Mass. 229, 234. The holding in the instant case properly emphasizes that a defense on the grounds of merger of damages will be sustained only where the insured is ultimately not prejudiced by the prior partial loss. It should be termed a doctrine of merger of damages, not merger of losses, because its basis is want of damnification. The reason for the rule is that insurance is essentially a contract of indemnity and is not a contract for the payment of a sum of money on the happening of a certain event.